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SUPREME COURT, U.S.

I N T H E  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. — 76-5146

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MICHAEL L. RUDOLPH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT  
OF THE STATE OF WISCONSIN

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## OPINIONS BELOW

The per curiam opinion of the Wisconsin Supreme Court affirming the conviction in Michael L. Rudolph v. State was unpublished, as was the decision of the same Court denying petitioner's motion for rehearing. A copy of the opinion and the denial of the motion for rehearing are attached to this petition and made a part of it. This case was docketed as State No. 234 (1974).

JURISDICTION

Petitioner, Michael L. Rudolph respectfully asks this Court to review the judgment of the Wisconsin Supreme Court entered on March 2, 1976, and the denial by the same Court of his motion for rehearing, announced on May 4, 1976.

Petitioner respectfully invokes this Court's jurisdiction pursuant to the provisions of 28 U.S.C. 1257(3). Petitioner claims infringement of rights and privileges guaranteed by the Constitution of the United States.

QUESTION INVOLVED

Did the trial court commit prejudicial error in allowing, over defense objection, testimony that defendant exercised his constitutional right against self-incrimination while in police custody?

Wisconsin Supreme Court answered: No.

CONSTITUTIONAL PROVISIONS  
AND STATUTES INVOLVED

United States Constitution

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"Section 1. All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws."

Wisconsin Statutes (1973)

"943.02 Arson of buildings; damage of property by explosives. (1) Whoever does any of the following may be imprisoned not more than 15 years:

- (a) By means of fire, intentionally damages any building of another without his consent; or
- (b) By means of fire, intentionally damages any building with intent to defraud an insurer of that building; or
- (c) By means of explosives, intentionally damages any property of another without his consent."

"943.10 Burglary. (1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony therein may be imprisoned not more than 10 years:

- (a) Any building or dwelling; or
- (b) An enclosed railroad car; or
- (c) An enclosed portion of any ship or vessel; or
- (d) A locked enclosed cargo portion of a truck or trailer; or
- (e) A room within any of the above."

STATEMENT OF FACTS

On June 30, 1973, petitioner's brother, William Rudolph, burglarized St. Joseph's Church in the City of Marinette, Wisconsin, and set fire to the church. Both petitioner (hereinafter defendant), and his brother, William, were charged with the burglary and arson in a criminal complaint filed July 6, 1973. Following a preliminary hearing and pretrial motions, William Rudolph entered pleas of guilty to the charges of burglary and arson of the church. Defendant was tried to a jury and found guilty of arson and burglary of the church.

At defendant's trial there was testimony from which the jury could conclude that some person or persons broke into the church, attempted to open a safe, and intentionally set several fires in the church. The evidence linking defendant with the crime was circumstantial, as noted in the attached slip opinion of the Wisconsin Supreme Court. The trial court denied defendant's motion for dismissal at the close of the prosecution's case, commenting that it was a "close case" but that there was sufficient evidence of guilt to raise a jury question.

Defendant called only one witness, a court clerk who testified that defendant's brother had pled guilty to these charges. Defendant did not testify. During its case in chief the prosecution intentionally elicited testimony that defendant refused to speak to the police about this fire after his arrest. Defendant objected and the court overruled the objection stating:

"Oh I think the jury is entitled to the explanation, the defendant is under no obligation to talk with the officer at all. The defendant was perfectly within his rights in refusing to talk to the officer."

The prosecution also intentionally elicited testimony, over defense objections, that defendant and his brother did not respond to a police request that they come down to the police station to be

interviewed about the church fire and that defendant's brother refused to talk to police about the church fire when the police stopped the two men in their truck. Defendant's objections were overruled, the trial court finally stating:

"THE COURT: We have gone through this before, of course. Again, I want to say for the record, a man has a right to refuse to talk to a police officer if he wishes. We have been through this before and I have overruled the objection and the objection is overruled." (R. 248).

After conviction defendant moved for a new trial on the grounds (inter alia) that he was prejudiced by the trial court's failure to sustain his objections to testimony that he had exercised his constitutional right against self-incrimination and by the court's failure to instruct the jury to disregard that testimony. The trial court denied defendant's motion and the Wisconsin Supreme Court affirmed the conviction, on March 2, 1976, rejecting defendant's argument that the trial court committed reversible error in allowing testimony that defendant exercised his privilege against self-incrimination after his arrest. Defendant's motion for a rehearing was denied on May 4, 1976.

REASONS FOR GRANTING WRIT

THE WISCONSIN SUPREME COURT HAS DECIDED A  
SUBSTANTIAL FEDERAL QUESTION IN A MANNER  
NOT IN ACCORD WITH APPLICABLE DECISIONS  
OF THIS COURT.

In Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974, this Court stated:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." At 384 U.S. p. 468.



In United States v. Hale (1975), 422 U.S. 171, 95 S.Ct. 2133, 45 L. Ed. 2d 99, cited by defendant in his motion for rehearing before the Wisconsin Supreme Court, this Court, in the exercise of its supervisory authority over Federal Courts, affirmed the reversal by the D.C. Circuit Court of Appeals of Hales's conviction holding:

"Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

"As we have stated before: 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.' Shepherd v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L.Ed. 196 (1930). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact."

In Hale, supra, the defendant had taken the stand, and the prosecution used his silence to impeach his credibility. The trial court immediately instructed the jury to disregard the evidence of Hale's silence in custody, but the error was found prejudicial, despite the cautionary instructions.

In Doyle v. Ohio (1976), ---, U.S. ---, 96 S. Ct. 2240, --, L.Ed. ---, this Court held such testimony of an accused silence in custody to be a violation of the Due Process Clause of the Fourteenth Amendment. In the instant case, defendant never testified.

Thus, the decision of the Wisconsin Supreme Court, herein, is directly contrary to the Miranda decision, supra. The Wisconsin Supreme Court's denial of a rehearing rejected this Court's reasoning in Hale, supra, and this Court's decision in Doyle, supra, is clearly opposite to the state court's ruling in the instant case.

# CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Wisconsin Supreme Court. In light of the Doyle decision, petitioner respectfully submits that the decision of the Wisconsin Supreme Court herein should be summarily reversed.

Respectfully submitted,

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State Public Defender

  
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Attorneys for Petitioner.

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St. No. 234 (1974)

August Term, 1975

STATE OF WISCONSIN : IN SUPREME COURT

Michael L. Rudolph,

Plaintiff in Error,

v.

State of Wisconsin,

Defendant in Error.

11 R 2 - 1976  
RC -  
CLEP -  
MADISON, WIS.

ERROR to review a judgment and order of the circuit court for Marinette county: JAMES A. MARTINEAU, Circuit Judge.

PER CURIAM. Writs of error were issued in this case to review the judgment of conviction in an order denying a motion for acquittal or a new trial. Plaintiff in error was convicted of one count of burglary, contrary to sec. 943.10(1) (a), Stats., and one count of arson, contrary to sec. 943.02, Stats., following a jury trial and verdicts of guilty.

One June 30, 1973, St. Joseph's Church in the city of Marinette was broken into. The church safe, weighing 111 pounds, was taken off a 5 foot high wall cabinet and down a flight of stairs to the church basement, where an unsuccessful attempt was made to open the safe with a long metal rod, a crucifix and a mallet. Apparently, church candles were used to provide illumination for the attempted opening of the safe. Human feces were found in a hallway of the church, and fires were started in several parts of the church, resulting in \$120,000 damage.

Plaintiff in error and his brother were stopped while riding in their van by a cruising police officer on July 4, 1973.

The officer stopped them because he knew they were wanted for questioning on the arson and burglary. Both plaintiff in error and his brother refused to talk to the officer. A crowd gathered. The officer radioed for help. After help arrived, the officer radioed the police lieutenant in charge of the arson and burglary investigation and was told to take the two into custody. The brothers were arrested on charges of disorderly conduct. The crowd which gathered finally grew to some 400 people, and its control required every available officer in the Marinette police department and officers from outlying areas.

The evidence against plaintiff in error was circumstantial. Tennis shoes which plaintiff in error was wearing at the time he was arrested were covered with drops of wax. Analysis by the state crime laboratory disclosed that the components of this wax were consistent with the 514 beeswax candles used in the church and spots of wax taken from the church safe. There was testimony that these candles were unusual in their components, and required by church law. The church obtained the candles from Jandrains Religious Supply Store in Green Bay. In addition, there was soot on the surface of the wax spots on plaintiff in error's shoes. There was testimony that such soot is usually found in arson cases. It was of the same type found in the wax taken from the top of the church safe. Finally, plaintiff in error's brother pleaded guilty to charges of arson and burglary. This evidence was introduced by the attorney for plaintiff in error at the close of the state's case.

We conclude there was probable cause to arrest plaintiff in error for disorderly conduct, and therefore affirm the trial court's denial of a motion to suppress the tennis shoes as evidence, on the ground they were seized pursuant to an unlawful arrest. We also conclude the jury was entitled to infer that more than one person was involved in lifting the safe off its cabinet in the sacristy of the church and carrying it down

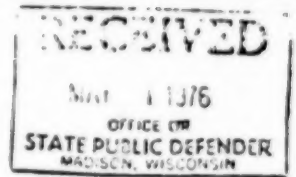
a flight of stairs to the basement, notwithstanding that it was possible for one person to move the safe. This inference together with the wax and soot on plaintiff in error's shoes, his actions when he and his brother were stopped for questioning, and his brother's subsequent plea of guilty, is sufficient to support conviction beyond a reasonable doubt.

Two issues are raised in this case with respect to the conduct of the trial. It is claimed that the trial court erred in failing to give a sufficient cautionary instruction after the prosecution brought out that the plaintiff in error had exercised his privilege against self-incrimination. It is also claimed that the court erred in admitting testimony that plaintiff in error did not respond to a police request that he come down to the police station to be interviewed about the church incident. With respect to the first issue, the trial court explained to the jury that the defendant was under no obligation to talk with the police officer and was within his rights in so refusing. We hold this is a sufficient cautionary instruction. The testimony with respect to plaintiff in error's failure to appear voluntarily for questioning was that the request was made of plaintiff in error's mother by telephone to have her inform both plaintiff in error and his brother to contact the investigating officer because he wanted to talk to them about the arson and burglary. There was no showing made that this information was communicated to plaintiff in error by his mother. The relevance of this testimony was minimal, but we are unable to discover any prejudicial effect from its admission, and therefore hold the trial court did not abuse its discretion in allowing the testimony.

The judgment and order are affirmed.



Office of the Clerk  
**SUPREME COURT**  
STATE OF WISCONSIN



ROBERT O. UEHLING  
CLERK

Madison, May 4, 1976

To ☒ Howard B. Eisenberg, State Public Defender  
Wm. L. Gansner, Asst. Atty. General

Sir--The Court today announced decision in your case as follows:

MICHAEL L. RUDOLPH v. STATE, St. #234 (1974).

MOTION FOR REHEARING DENIED WITHOUT COSTS.

~~THE CLERK OF SUPREME COURT HAS FILED THIS DECISION~~

Respectfully yours,  
ROBERT O. UEHLING

Clerk of Supreme Court.



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STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
SUPREME COURT OF WISCONSIN

*for RSD*  
BRIEF IN OPPOSITION

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5146

MICHAEL L. RUDOLPH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

The question presented on this petition for writ of certiorari has not been satisfactorily stated by the petitioner. Respondent respectfully submits that the question fairly raised in this matter is as follows:

Whether reversible constitutional error was committed at petitioner's state court trial when testimony of a single instance of his silence in response to in-custody interrogation was introduced, but was immediately followed by an explanatory and cautionary instruction to the jury?

#### STATEMENT OF THE CASE

A concise statement of those facts material to consideration of the question presented can be found in the opinion of the Wisconsin Supreme Court in Rudolph v. State, St. No. 234 (March 2, 1976), a copy of which is appended to the petition for writ of certiorari.

Review of the Wisconsin Supreme Court's opinion will demonstrate, contrary to the impression created by petitioner's statement of facts, that only one instance of introduction of evidence as to petitioner's silence in response to in-custody interrogation was ever raised before that court on appeal.

#### ARGUMENT

THE DECISION OF THE WISCONSIN SUPREME COURT HOLDING THAT THE TRIAL COURT HAD GIVEN A SUFFICIENT CAUTIONARY INSTRUCTION IMMEDIATELY AFTER TRIAL TESTIMONY WAS ELICITED AS TO PETITIONER'S SILENCE DURING IN-CUSTODY INTERROGATION RAISES NO SUBSTANTIAL FEDERAL QUESTION.

The sole claim of constitutional error raised before the Wisconsin Supreme Court on petitioner's appeal from his arson and burglary convictions related to the state's introduction at trial of an investigating police officer's testimony that petitioner "didn't want to talk to me" when the officer attempted to interrogate the petitioner two days after his arrest. (State Appeal Record, R. 226.) Defense counsel had immediately objected to this testimony. The trial court's response was as follows:

"THE COURT: Oh, I think the jury is entitled to the explanation, the defendant is under no obligation to talk with the officer at all. The defendant was perfectly within his rights in refusing to talk to the officer." (State Appeal Record, R. 227.)

On his appeal to the state supreme court, petitioner argued both that the introduction of the officer's testimony was error, and that the trial court committed further error by failing to immediately instruct the jury to disregard the testimony. In its decision affirming petitioner's convictions, the Wisconsin Supreme Court described, and responded to, these issues in the following language:

"It is claimed that the trial court erred in failing to give a sufficient cautionary instruction after the prosecution brought out that the plaintiff in error had exercised his privilege against self-incrimination. . . . With respect to [this] issue, the trial court explained to the jury that the defendant was under no obligation to talk with the police officer and was within his rights in so refusing. We hold this is a sufficient cautionary instruction. . . ." State v. Rudolph, St. No. 234, at p. 3 (March 2, 1976).

Since inquiry into the sufficiency of a cautionary instruction to the jury would have been unnecessary if no error were present, it is clear that the Wisconsin Supreme Court presumed that the introduction of the officer's testimony was error. That implicit presumption was consistent with the position of the State of Wisconsin in the court below. At no time did the state attempt to justify or excuse the officer's testimony as to defendant's silence during custodial interrogation. It is clear, therefore, that the only issue which can be fairly raised from

the state supreme court's decision is whether that court was correct in concluding that the immediate jury admonition given by the trial court was sufficient to render the improper testimony harmless. Respondent submits that the Wisconsin Supreme Court was correct and, moreover, that its judgment in this respect presents no substantial federal question warranting the invocation of certiorari jurisdiction by this Court.

Petitioner's reliance upon this Court's decision in United States v. Hale, 422 U.S. 171 (1975), and Doyle v. Ohio, \_\_\_\_ U.S. \_\_\_\_, 96 S. Ct. 2240 (1976), is entirely misplaced. Unlike Hale and Doyle, there was in the present case no concerted effort by the state to construct defendant's silence during custodial interrogation into substantial proof of guilt. Nor was this a case where, in contravention of the more relevant decisions of this Court in Griffin v. California, 380 U.S. 609 (1965), and Miranda v. Arizona, 384 U.S. 436 (1966), the state was engaged in an intentional and systematic effort to "penalize an individual for exercising his Fifth Amendment privilege . . ." Miranda, 384 U.S. at 468, n. 37. Instead, there was in this case only one isolated improper reference to a criminal defendant's silence - only a solitary careless reference to that silence at one point on one page of a trial transcript in excess of 150 pages.

As this Court has carefully explained, the prejudice to a defendant which flows from evidence of invocation of his Fifth Amendment right to silence arises from the inherent ambiguity of such silence. Griffin, 380 U.S. at 614-615; Hale, 422 U.S. at 177; Doyle, 96 S. Ct. at 2244-2245. A defendant's silence during custodial interrogation may be the result of a myriad of factors, including nervousness, hostility, a proper reliance on the right to remain silent, or fear that his guilt may be revealed. The danger that

a jury might infer the last of these reasons as the cause of a defendant's silence is precisely the risk which this Court's decisions have sought to prevent. See Griffin, supra; Hale, supra.

In the present case, however, that danger was dissipated by the state trial court's immediate explanation to the jury that the petitioner was "under no obligation to talk with the officer" and "was perfectly within his rights in refusing to talk to the officer." (State Appeal Record, R. 227.) This immediate instruction dissolved the inherent ambiguity of petitioner's silence, and expressly informed the jury that there was but one reason for defendant's silence -- his entirely legitimate exercise of his constitutional right.

The Wisconsin Supreme Court was thus correct in holding that any error in the officer's mention of the petitioner's silence was rendered harmless by the trial judge's immediate cautionary action. This being the only decision of the state supreme court that may fairly be raised by petitioner before this Court, and there being no substantial federal question presented by the state court's application of the harmless error rule to this case, respondent submits that this case simply presents no issue meriting this Court's consideration.

#### CONCLUSION

Petitioner has failed to demonstrate any justification for the invocation of this Court's certiorari jurisdiction, much less the summary reversal of the state supreme court's judgment. The petition for writ of certiorari should be denied.



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